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# INDIVIDUALS ENFORCING INTERNATIONAL LAW: THE COMPARATIVE AND HISTORICAL CONTEXT

*Beth Stephens\**

## INTRODUCTION

For traditionalists, the concept of individuals enforcing international law has the whiff of an unpleasant oxymoron, implying a role for individuals in a legal system in which, the traditionalists insist, only sovereign states are legitimate players. From this perspective, individual efforts to enforce international law seem to conflict irreconcilably with a venerable legal precept: international law is created and applied only by sovereign states. Within the United States, individual involvement in international affairs also raises hackles. Defenders of a centralized vision of foreign policy contend that such efforts contradict the constitutional assignment of foreign affairs to the exclusive control of the political branches of the government—the executive branch and Congress.

As is often the case, there is less to both of these hoary precepts than meets the eye. Individuals have long occupied an important position in the enforcement of international law, as objects of punishment when they violate its mandates and as active agents seeking to implement its rules. Similarly, U.S. foreign policy has never been immune from the pressure and influence of individuals, nor could it or should it be in a democracy.

Both of these supposed truisms have been invoked to challenge an area in which I take particular interest, a series of federal lawsuits seeking damages for violations of international law. Founded on a 1980 interpretation of a statute originally enacted in 1789, the cases now also rely on three modern federal statutes.<sup>1</sup> These civil lawsuits for human rights abuses have triggered great excitement within the

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\* Associate Professor, Rutgers-Camden School of Law. My thanks to the participants at DePaul University College of Law's 2002 Robert A. Clifford Symposium on Tort Law and Social Policy, as well as to Roger Clark and my colleagues at a Rutgers-Camden faculty workshop, for helpful comments on an earlier draft. I should note that I have participated in several of the human rights lawsuits discussed in this Article, as counsel for plaintiffs or as a consultant.

1. The Alien Tort Claims Act (ATCA) 28 U.S.C. § 1350 (1994), was originally enacted as part of the Judiciary Act of 1789. The three modern statutes are cited and discussed in the following section.

human rights community, viewed as an important step in the long-term movement toward the enforcement of human rights norms. But as the cases multiply and the range of defendants targeted widens to include corporations, foreign governments, former and current politicians, and the U.S. government, concerns have been raised about the foreign policy implications. Criticism has recently focused on the prominent role the cases offer to individual plaintiffs, the victims of human rights abuses who initiate and control the civil litigation. This litigation permits individuals to influence decisions that the executive branch would prefer to decide based on political and diplomatic concerns, an impact that has been labeled "plaintiff's diplomacy."<sup>2</sup> Critics charge that such legal actions distort the structure of international law and the balance of power among the branches of our federal government, while threatening to undermine the measured progress of foreign relations.

Despite these somewhat apocalyptic claims, dozens of such lawsuits have been litigated without any evidence that they have weakened the structure of international law or threatened the coherence of our government's foreign policy, much less the foundations of the U.S. constitutional system. Why the disconnect between reality and rhetoric?

One set of explanations points out that the volume of litigation is actually quite low, that meritless cases are dismissed by judges, and that any complications caused by individual "meddling" in foreign affairs are minor and easily rectified by the executive branch.<sup>3</sup> I agree with all of these points, but choose in this Article to look at the role of individuals in a broader historical and comparative context. Concerns about the impact of human rights litigation on international law and foreign affairs wrongly assume that individual involvement in foreign affairs is novel and out of step with the governing paradigms of international law, with the practice in other jurisdictions, and with our own legal traditions. To the contrary, individuals have historically occupied an important role in the enforcement of international law and the development of foreign policies in this country and abroad. Individuals play that role through nonjudicial means such as lobbying, demon-

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2. The term was coined by an article of the same name that is supportive of most such litigation. Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, 79 FOREIGN AFF. 102, 103 (2000).

3. I exchanged views on these issues with Professors Curtis Bradley and David Bederman at an April 2001 symposium sponsored by the American Enterprise Institute, with our papers later published by the Chicago Journal of International Law. See David J. Bederman, *International Law Advocacy and its Discontents*, 2 CHI. J. INT'L L. 475 (2001); Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457 (2001); Beth Stephens, *Taking Pride in International Human Rights Litigation*, 2 CHI. J. INT'L L. 485 (2001).

strating, political organizing, and nonviolent resistance in addition to international complaint procedures and domestic litigation.

In this Article, after first providing an overview of human rights litigation in the United States, I explore the historical role of individuals in international law enforcement, on the international stage, and within the United States and other domestic legal systems. It is important to note that these actions are not extralegal mechanisms. Individuals are not taking the law into their own hands, hunting down perpetrators and subjecting them to popular justice. Rather, each of these actions are lawful, state-sanctioned enforcement mechanisms, through which national and international bodies have empowered individuals to assist in the enforcement of the rights granted to them by international law.

In some measure, these mechanisms reflect the recognition that human rights are ultimately too important to be left to the unscrutinized domain of governments and government officials. Pragmatic politicians need to be confronted by citizens who oppose the compromises of power. So-called private attorneys general, proudly practicing "plaintiff's diplomacy," are not just an unavoidable nuisance, but rather an essential tool in the protection of basic human rights.

#### I. U.S. HUMAN RIGHTS LITIGATION: INDIVIDUALS SEEKING REDRESS FOR VIOLATIONS OF INTERNATIONAL LAW

Recent controversy over the role of individuals in the enforcement of international law has been triggered by a series of federal court cases challenging human rights abuses committed both in the United States and abroad. The cases stem from the Alien Tort Claims Act, a once-obscure provision of the Judiciary Act of 1789, which states, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>4</sup> Barely cited for almost two hundred years, the statute rose to prominence after the 1980 decision in *Filártiga v. Peña-Irala*<sup>5</sup> interpreted it as authorizing a civil claim by an alien for the tort of torture.<sup>6</sup> Three modern federal statutes have extended the right to sue for certain human rights violations to U.S. citizens. Critics charge that these claims permit private individuals and the judiciary to play a risky, even unconstitutional role in the development and implementation of U.S. foreign policy.

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4. 28 U.S.C. § 1350 (1994).

5. 630 F.2d 876 (2d Cir. 1980).

6. *Id.*

Much about the deceptively simple Alien Tort Claims Act has been subjected to relentless scrutiny and debate, including the statute's original purpose and modern reach. In this section, I offer a brief overview of the human rights litigation at the center of the current policy debate, followed by a review of the legal and policy controversies spurred by this line of cases.

#### A. *The Filártiga Precedent*

After lying largely dormant for nearly two hundred years, over the past twenty years the Alien Tort Claims Act (ATCA) has played a prominent role in the global movement to hold accountable those who violate human rights. The transformation of this statute began in 1980, with the Second Circuit's decision in *Filártiga*. The case involved the torture and murder of a seventeen-year-old Paraguayan in Paraguay by a Paraguayan police officer. After discovering the perpetrator lived in New York City, the family sued the officer in U.S. federal court and eventually obtained a \$10.4 million judgment against him. The court held that the ATCA authorizes federal court suits for universally recognized human rights violations, including torture, as those rights are defined by modern international law. The statute applies whether or not the plaintiff or the events have links to the United States, so long as the court has personal jurisdiction over the defendant.

The *Filártiga* precedent has been the foundation for dozens of lawsuits. The courts have held that jurisdiction is triggered when an alien alleges a violation of a "universal, definable and obligatory" human rights norm.<sup>7</sup> Recognized violations include genocide, war crimes, summary execution, torture, and slavery, each as defined by international law. Many of the cases follow the *Filártiga* model, with a victim suing an individual who personally committed a gross human rights violation. Representative of these is the case filed by three Ethiopian women who were brutally tortured during the Red Terror in Ethiopia.<sup>8</sup> After one of them discovered their torturer working alongside her in a hotel in Atlanta, they filed an ATCA claim against him. With little hope of collecting money damages, their goals included the opportunity to confront him in court, create a record of his abusive past, and facilitate their own recovery from the trauma they had suffered.

The courts have also developed standards based on international law to determine *who* can be held accountable for an international law

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7. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987).

8. *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996).

violation. Liability has been imposed upon commanding officers, officials of *de facto* states, U.S. and local government officials, and corporations. In *Xuncax v. Gramajo*,<sup>9</sup> for example, a Guatemalan general was held liable for a widespread campaign of executions, torture, and other abuses committed by forces under his command.<sup>10</sup> Additionally, the Ninth Circuit has held that the U.S. Immigration and Nationalization Service can be sued for violations of the internationally protected rights of detainees.<sup>11</sup>

A key turning point in the U.S. litigation came in 1995 when the Second Circuit recognized that some international human rights norms, such as the prohibition against genocide, apply to private actors.<sup>12</sup> In addition, the court held that where state action is required, an individual can be held liable for acting in concert with government officials, applying color of law principles developed pursuant to the U.S. civil rights statutes.<sup>13</sup> These holdings paved the way for litigation against corporations, either for abuses that do not require state action or for those committed in concert with government actors. The number of cases filed increased rapidly once it became possible to sue corporations, in part because such defendants are far more likely than individual foreigners to have assets to pay a judgment. None of the corporate cases has yet produced a final judgment for plaintiffs, but several preliminary rulings have upheld the legal proposition that the ATCA applies to corporate defendants. A case against Royal Dutch Shell Corporation for abuses allegedly committed in Nigeria, for example, is currently in pretrial discovery after a series of rulings rejected challenges to personal jurisdiction, *forum non conveniens*, and the sufficiency of the allegations of corporate complicity in the human rights violations.<sup>14</sup>

Approximately one hundred cases leading to decisions available online have alleged jurisdiction under the ATCA and the related statutes, with about twenty of these predating *Filártiga*. Of the total cases filed, about one-third have been dismissed in the early stages for lack of jurisdiction or claims of immunity. As noted by the *Filártiga* court,

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9. 886 F. Supp. 162 (D. Mass. 1995).

10. *Id.*

11. See *Papa v. United States*, 281 F.3d 1004 (9th Cir. 2002).

12. *Kadic v. Karadzic*, 70 F.3d 232, 239-40 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

13. *Id.* at 245 (citing 42 U.S.C. § 1983 (1994)).

14. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001) (rejecting challenges to personal jurisdiction and *forum non conveniens*); *Wiwa v. Royal Dutch Petroleum Co.*, RICO BUS. DISP. GUIDE 10.216, 2002 WL 319887, at \*13-14 (S.D.N.Y. Feb. 28, 2002) (rejecting claim that complaint failed to state a claim against the corporate defendants).

an allegation of a violation of international law is part of the jurisdictional prerequisite for a case based on the ATCA; as a result, such cases require a "more searching preliminary review" at the pleading stage and will be dismissed if the complaint does not allege a universally recognized international law norm.<sup>15</sup> Applying the strict standard, *Bigio v. Coca-Cola Co.*,<sup>16</sup> for example, rejected a claim that the company violated international law by acquiring property that had earlier been wrongly expropriated by the Egyptian government,<sup>17</sup> while *Wong-Opasi v. Tennessee State University*<sup>18</sup> dismissed an ATCA claim based on state contract and tort law.<sup>19</sup> Cases have also been dismissed on a finding of immunity from suit, including a lawsuit against the government of Argentina for the bombing of a British oil tanker during the Falklands War.<sup>20</sup>

Most of the successful ATCA cases allege egregious violations of individual rights, such as genocide, summary execution, war crimes, disappearance, or torture. Moreover, most of the successful cases involve defendants who are either citizens or long-term residents of the United States. A few have been filed against short-term residents and at least one—*Filártiga*—against an illegal alien living in this country, but cases based on the transient presence of defendants traveling through this country represent a small minority of the overall litigation.

Three modern statutes also provide jurisdiction for human rights claims in U.S. courts. The Torture Victim Protection Act,<sup>21</sup> enacted in 1992, provides aliens or U.S. citizens a cause of action for torture or extrajudicial execution committed "under color of foreign law."<sup>22</sup> A second statute, originally enacted in 1990 as part of an anti-terrorism initiative, authorizes civil suits by U.S. nationals who are victims of terrorism.<sup>23</sup>

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15. *Filártiga*, 630 F.2d at 887.

16. 239 F.3d 440, 447-50 (2d Cir. 2000).

17. *Id.*

18. 229 F.3d 1155 (6th Cir. 2000) (table case), No. 99-5660, No. 99-5668, 2000 WL 1182827, at \*2 (unpublished disposition).

19. *Id.*

20. *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428 (1989) (dismissing claim based on the immunities provided by the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602-1611 (1994 & Supp. V 1999)).

21. 28 U.S.C. § 1350 (note) (1994).

22. *Id.*

23. 18 U.S.C. § 2333(a) (1994) (authorizing U.S. nationals injured by "an act of international terrorism" to sue for treble damages).

Finally, an exception to the Foreign Sovereign Immunities Act (FSIA)<sup>24</sup> permits U.S. citizens to sue a handful of foreign governments for torture, extrajudicial killing, and other abuses. The FSIA exception responded to disappointment with failed efforts to sue foreign governments under the ATCA, the result of the 1989 Supreme Court decision that human rights claims do not create an independent exception to foreign sovereign immunity.<sup>25</sup> Holding that Congress intended the FSIA to cover the entire field, the Court ruled that suits against foreign governments can proceed only if the claims fall within one of the FSIA's enumerated exceptions to immunity.<sup>26</sup>

Two later cases provoked strong congressional unease with this application of sovereign immunity. In the first, *Hugo Princz*, a U.S. survivor of Nazi concentration camps, sued Germany for reparations; he had been excluded from German compensation plans due to his U.S. citizenship. Over a strong dissent by Judge Wald, the District of Columbia Circuit found that sovereign immunity precluded the lawsuit.<sup>27</sup> Faced with movement in Congress to lift immunity in this case, Germany reached a settlement with Princz.<sup>28</sup> Just a few years later, a lawsuit filed against Libya by the families of those killed in the bombing of Pan Am Flight 103 over Lockerbie, Scotland was dismissed on the basis of foreign sovereign immunity. This time, the families successfully lobbied Congress to create a new exception to the FSIA. Originally introduced as an across-the-board exception to immunity for claims of torture, extrajudicial execution, and certain acts of terrorism, a last-minute amendment reduced its scope. As enacted, U.S. citizens may file such claims, but only against foreign governments that have been designated by the U.S. government as "state sponsors of international terrorism."<sup>29</sup> About a dozen such lawsuits have been litigated; as discussed below, efforts to collect the resulting judgments by seizing the assets of the defendant governments have triggered heated con-

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24. 28 U.S.C. §§ 1330, 1602-1611 (1994).

25. See *Amerada Hess Shipping*, 488 U.S. 428.

26. The exceptions are set forth in 28 U.S.C. § 1605(a) (Supp. V 1999). See *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) (upholding human rights claim that fell within the then-existing FSIA exceptions).

27. *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1176-84 (D.C. Cir. 1994) (Wald, J., dissenting).

28. See Kimberly J. McLarin, *Holocaust Survivor Will Share \$2.1 Million in Reparations*, N.Y. TIMES, Sept. 20, 1995, at B5.

29. 28 U.S.C. §§ 1605(a)(7)(A), (B)(ii) (Supp. V. 1999). See 22 C.F.R. § 126.1(d) (2000) (designating seven states as sponsors of terrorism: Iran, Cuba, Syria, Iraq, Libya, Sudan, and North Korea). The lobbying efforts that led to passage of the amendment are described in ALLAN GERSON & GERRY ADLER, *THE PRICE OF TERROR: ONE BOMB. ONE PLANE. 270 LIVES. THE HISTORY MAKING STRUGGLE FOR JUSTICE AFTER PAN AM 103* (2001).



frontations involving the judiciary, Congress, and the executive branch.

### *B. The Current Controversy*

Litigation based on these four statutes has triggered an extensive academic debate. Critics claim the litigation affords private individuals and the judiciary an inappropriate, even unconstitutional, impact on foreign policy. Curtis Bradley summarized his concerns in a recent article:

The most significant cost of international human rights litigation is that it shifts responsibility for official condemnation and sanction of foreign governments away from elected political officials to private plaintiffs and their representatives. The plaintiffs and their representatives decide whom to sue, when to sue, and which claims to bring. These actors, however, have neither the expertise nor the constitutional authority to determine US foreign policy. Nor, unlike our elected officials, will these actors have the incentive to weigh the benefits of this litigation against its foreign relations costs.<sup>30</sup>

Critics have pointed to several categories of cases as particularly problematic. One central concern arises when cases address human rights abuses by governments with which the United States government is forging political and commercial ties, such as China. A lawsuit against a top Chinese leader allegedly responsible for the 1989 massacre of peaceful protesters in Tiananmen Square is frequently cited as an example of improper interference with U.S. foreign policy.<sup>31</sup> Bradley worries that such human rights lawsuits “threaten to interfere with” the executive branch’s “carefully calibrated strategy” towards China.<sup>32</sup>

Concern about the foreign policy implications of these cases also arises from several controversial claims filed against corporations for abuses committed during World War II. Although most of these cases have been dismissed, they have contributed to political pressure for settlements with German and Austrian banks, insurance companies, and other businesses. Ann-Marie Slaughter and David Bosco worry about the impact of such litigation on foreign relations. “In the past, issues such as compensation for wartime crimes would have been dealt with exclusively on a government-to-government level, exclud-

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30. Bradley, *supra* note 3, at 460.

31. See *Feng Suo Zhou v. Li Peng*, Civ No. 00-6446, 2002 U.S. Dist. LEXIS 14648 (S.D.N.Y. Aug. 8, 2002) (order denying motion to quash service) (describing allegations of the complaint); Edward Wong, *Chinese Leader Sued in New York Over Deaths Stemming from Tiananmen Crackdown*, N.Y. TIMES, Sept. 1, 2000, at A6.

32. Bradley, *supra* note 3, at 461.

ing individuals.”<sup>33</sup> These lawsuits, however, “forced the hands” of the U.S., German, and Austrian governments: “The disputes were ultimately settled through an amalgam of classic intergovernmental negotiation and private discussion, but it was litigation that put the issue on the agenda in the first place.”<sup>34</sup> This use of litigation as leverage in settlement negotiations has led to criticism of the whole line of human rights litigation.

Cases filed directly against foreign governments under the “state sponsors of terrorism” exception to the Foreign Sovereign Immunities Act have also triggered concern about interference with foreign policy. Commentators argue that judgments already totaling over three billion dollars could complicate efforts to normalize diplomatic relations with some of the states on the list, tying the hands of future diplomats, even if reformers come to power in any or all of the targeted states and policies change.<sup>35</sup> The judgments also raise the danger of retaliatory litigation against the government of the United States. For example, in response to a judgment against Iran, that country reportedly enacted legislation authorizing suit against the United States for abuses committed during the 1953 *coup d’etat*.<sup>36</sup> Judicial orders to pay judgments issued under this statute have pitted the executive branch against the judiciary, with Congress frequently siding with the plaintiffs and the judiciary. In response to difficulties in enforcing judgments, Congress passed a law to facilitate collection in some of the lawsuits, but allowed the Executive to waive some of its provisions.<sup>37</sup> Executive branch decisions to invoke waivers and to oppose judicial collection efforts have triggered angry responses from both Congress and the courts.

Pinpointing the responsibility for creating these potential conflicts, as well as the recommendations for responding to them, depends upon the nature of the statute giving rise to the litigation. The legal issues

33. Slaughter & Bosco, *supra* note 2, at 108.

34. *Id.*

35. See Daveed Gartenstein-Ross, Note, *Resolving Outstanding Judgments Under the Terrorism Exception to the Foreign Sovereign Immunities Act*, 77 N.Y.U. L. REV. 496, 497-500, 515-16 (2002) (discussing size of judgments and difficulties they pose to normalization of diplomatic relations).

36. See *Tehran to Set Up Special Court for Lawsuits Against the U.S.*, AGENCE FR. PRESSE, Nov. 15, 2000, available at 2002 WL 24759851 (last visited Nov. 15, 2002); *Iran MPs Cry “Down with America,” Approve Lawsuits Against United States*, AGENCE FR. PRESSE, Nov. 1, 2000, available at 2002 WL 24749300 (last visited Nov. 15, 2002).

37. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §§ 2002, 2003, 114 Stat. 1541, 1541-43 (2000); Gartenstein-Ross, *supra* note 35, at 515 n.102. Gartenstein-Ross details the byzantine maneuvering in the courts and Congress over these judgments. *Id.* at 517 n.113.

surrounding the three modern statutes are relatively straightforward and their constitutionality is not in doubt. Each was enacted by a modern Congress, with extensive legislative history, and the courts are able to rely on current sources to interpret congressional intent. To the extent that cases triggered by any of the statutes cause foreign policy concerns, both responsibility for the problem and the power to rectify the situation rest squarely with Congress, which enacted the legislation, and the executive branch, which signed the statutes into law.

By contrast, interpretation of the Alien Tort Claims Act requires both a review of scattered historical documents and an understanding of eighteenth century attitudes towards international law, civil and criminal claims, and the Constitution. This effort has produced a prodigious amount of academic scholarship,<sup>38</sup> while at the same time the federal judiciary has shown remarkable agreement on the core meaning of the statute. The courts have generally agreed that the statute affords a cause of action as well as jurisdiction and delegates to the federal courts the task of defining the exact nature of the permissible claim. This approach was summarized succinctly by the Ninth Circuit: "We start with the face of the statute. It requires a claim by an alien, a tort, and a violation of international law."<sup>39</sup> As stated by the Eleventh Circuit: "Congress, of course, may enact a statute that confers on the federal courts jurisdiction over a particular class of cases while delegating to the courts the task of fashioning remedies that give effect to the federal policies underlying the statute."<sup>40</sup>

Some scholars have disagreed with this interpretation. They point to the sparse language of the statute and the limited historical record, and accuse the judiciary of creating an individual cause of action that was not intended by Congress. Under this view, the judiciary bears the responsibility for the foreign policy tensions attributed to ATCA claims. This criticism, however, misses one of the few points of agreement about the meaning of the statute. For in the midst of much debate about the origins and meaning of the Alien Tort Claims Act, there seems to be no doubt that the statute, when enacted, was intended to authorize *individuals* to seek damages for injuries caused by a violation of the law of nations. This undisputed issue is central to my discussion, so I will highlight it in a section of its own.

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38. A Westlaw search for "Filartiga or 'Alien Tort'" conducted in July 2002 produced 1419 hits in the Journals and Law Reviews database.

39. *Trajano v. Marcos*, 978 F.2d 493, 499 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993).

40. *Abebe-Jira*, 72 F.3d at 848.

### C. *Individuals and International Law: A Point of Consensus*

The eighteenth century leaders of our emerging nation apparently concluded that permitting individuals to seek compensation for violations of international law would further, not hinder, our foreign policy. Their recognition of the importance of private damage claims provides an important counterpoint to modern efforts to subjugate such individual actions to the federal government's centralized control over foreign policy.

In the decade preceding ratification of the Constitution, the leaders of the embattled Confederation expressed growing concern about their inability to enforce the nation's international law obligations. This weakness, which threatened to draw the country into war with nations offended by unsanctioned violations of international law, was one of the motivating forces behind the decision to reframe the relationship among the states. At an early session of the Constitutional Convention, for example, Edmund Randolph complained that the Confederation risked being dragged into foreign wars because Congress "could not cause infractions of treaties or of the law of nations, to be punished;" as a result, the states "might by their conduct provoke war without controul [sic]."<sup>41</sup>

Although no specific legislative records have been uncovered, the ATCA appears to derive from a series of resolutions passed by the Continental Congress, each responding to the inability of the national government to enforce international law. The various proposals to strengthen enforcement of international law norms included a mix of criminal and civil actions, with injured individuals granted an important role in protecting their own rights. In 1781, for example, a congressional committee report noted the problems created by the states' failure to prosecute violations of the law of nations.<sup>42</sup> The report recommended state criminal prosecutions, but also proposed that if individuals were harmed by such a violation, "the author of those injuries should compensate the damage out of his private fortune."<sup>43</sup> A congressional resolution then recommended that when international law was violated, the states should both initiate criminal prosecutions and

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41. See *Madison's Notes*, May 29, 1787, in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (Max Farrand ed., 1937). Jack Rakove has emphasized the centrality of this concern: "[B]efore 1787 it was the inability of the existing Continental Congress to frame and implement adequate foreign policies that evoked the most telling criticisms of the 'imbecility' of the Articles of Confederation." Jack N. Rakove, *Making Foreign Policy — The View from 1787*, in FOREIGN POLICY AND THE CONSTITUTION 1, 2 (Robert A. Goldwin & Robert A. Licht eds., 1990).

42. Edmund Randolph et al., *Report to Congress (1781)*, in 3 THE FOUNDERS' CONSTITUTION 66 (Philip B. Kurland & Ralph Lerner eds., 1987).

43. *Id.*

“authorise [sic] suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen.”<sup>44</sup> In apparent response, a 1782 Connecticut law afforded a civil tort remedy for injuries to foreign states or their citizens caused by a violation of international law as well as establishing criminal penalties.<sup>45</sup>

These efforts to rely on the states to punish international law violations were largely a failure. The Constitution relied instead on the establishment of federal courts with jurisdiction over violations of international law. The First Congress enacted a crime bill that imposed criminal sanctions for certain violations of the law of nations including, for example, to “assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister . . . .”<sup>46</sup> But, in keeping with the criminal/civil remedy approach, the First Congress also enacted the Alien Tort Claims Act, providing that an individual harmed by a violation of international law could sue in federal court for damages. This mixed approach to international law violations, encompassing both criminal prosecution of the perpetrator and compensation to those injured through a civil suit, would have been familiar to the founding generation. Early U.S. law, both state and federal, employed a fluid mix of civil and criminal actions to sanction violations of the law.

The public/private, civil/criminal approach also reflected eighteenth century views of international law and the role of the individual within it. The following section looks at the international law context, discussing first the historical background and then reviewing the expanding role of individuals enforcing international law in international tribunals, particularly over the past fifty years. The subsequent sec-

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44. *Id.* at 66-67.

45. See *An Act to Prevent Infractions of the Law of Nations, May, 1782*, in 4 THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT FOR THE YEAR 1782, at 156-57 (L. Larabee ed., 1942); William R. Casto, *Correspondence*, 83 AM. J. INT'L L. 901, 902-03 (1989). The Connecticut statute was drafted by Oliver Ellsworth who later, as a member of Congress, drafted the ATCA. See *id.* at 902-03; WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 27-53 (1995).

46. The Crime Bill of Apr. 30, 1790, ch. 9, § 28, 1 Stat. 112, 117-18 (1790). Further codification was unnecessary at the time since the federal courts exercised the power to punish common law crimes until the Supreme Court held otherwise in 1816. See *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415, 416-17 (1816); *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812). Several early prosecutions were based on common law violations of the law of nations without congressional codification of the crime. See, e.g., *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 161 (1795); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793); *Henfield's Case*, 11 F. Cas. 1099, 1108 (C.C.D. Pa. 1793) (No. 6360).

tion takes a comparative perspective, looking at comparable actions in other domestic legal systems. I thereby return to my central point: although the mode of seeking relief varies widely, individual enforcement of international law norms is neither a new phenomenon, nor unique to the United States.

## II. THE ROLE OF INDIVIDUALS IN INTERNATIONAL LAW ENFORCEMENT

Debates about the role of individuals in international law trigger heated exchanges. Are individuals "subjects" or "objects" of international law? Do individuals have "international legal personality"? At one extreme, commentators argue that international law is solely a matter of state-to-state relations, that states define and enforce international norms with individuals enjoying only those rights granted to them by governments. At the other extreme, scholars assert that individuals are the exclusive subjects and architects of international law, while states are nothing more than the sum of the individuals who compose them.<sup>47</sup>

As with many entrenched disagreements, the debate disintegrates in large part into a battle of contradictory definitions of subject, object, and legal personality. Looking behind the conflicting terminology, there is room for surprising agreement in practice about the many functions individuals actually assume in the enforcement of international law. Fundamental to identifying common ground is the recognition that not all actors play the same roles on the international law stage. As the International Court of Justice noted long ago, "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community."<sup>48</sup> Thus, recognizing that individuals have certain rights and duties under international law does not imply that those attributes are identical to those of states. International law is largely a product of state-to-state negotiation. Individuals, however, have long asserted both rights and duties under international law and clearly play an important role in the development and enforcement of that law, a role that has grown rapidly over the past sixty years.

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47. For a detailed historical review of the varied positions on these questions, see Marek St. Korowicz, *The Problem of the International Personality of Individuals*, 50 AM. J. INT'L L. 533 (1956).

48. *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 178 (Apr. 11).

Ancient scholars had little difficulty understanding the role of individuals within international law. Viewing international law as originating in part from religious or natural law sources, they recognized that such norms applied directly to govern the conduct of individuals.<sup>49</sup> Through the end of the eighteenth century, international norms and sanctions were viewed as founded upon religious belief as well as social custom and reason. This set of sources led to the all-encompassing system of international rules described by William Blackstone as founded upon “maxims and customs . . . of higher antiquity than memory or history can reach” and construed by reference to “the law of nature and reason, being the only one in which all the contracting parties are equally conversant and to which they are equally subject.”<sup>50</sup> These rules governed all interactions among foreign states and their citizens, not just those between sovereign states:

The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.<sup>51</sup>

Within this system, private individuals bore important and enforceable rights. The entire set of rules governing commercial and property transactions was enforced through private claims. Offenses could be sanctioned through both criminal prosecutions and private claims for compensation.<sup>52</sup> Blackstone’s summary of international law enforcement thus provides for both criminal punishment of individual violators and enforceable rights for individuals harmed by such violations.<sup>53</sup>

Punishment of individuals who violate international law has been a consistent feature of the system. Piracy, for example, a crime that has been outlawed by international law for centuries, is by definition committed by individuals acting without state authorization. Writing in the eighteenth century, Blackstone listed piracy as one of the “princi-

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49. DAVID J. BEDERMAN, *INTERNATIONAL LAW IN ANTIQUITY* 48-87 (2001).

50. 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*67 (Wayne Morrison ed., 2001) (1753) [hereinafter 4 BLACKSTONE].

51. *Id.* at \*66.

52. *Id.* at \*66-72.

53. Thus, Blackstone noted that several contemporaneous statutes offered “restitution” and “amends” to the victim of a violation, in tandem with criminal prosecutions. *Id.* at \*69-70. “[I]f any of the king’s subjects attempt or offend upon the sea, [the justices] may cause full restitution and amends to be made to the party injured.” *Id.* Blackstone provided a list of eighteenth century criminal sanctions and civil remedies available to punish individuals who violated international law and to compensate private persons who were harmed by the violations.

pal offenses against the law of nations . . . .”<sup>54</sup> The slave trade has been outlawed by international law since the nineteenth century, a prohibition that applied equally to states and individuals.<sup>55</sup> Internationally sanctioned punishment of pirates and slave traders provided the model for punishment of war crimes and other universally condemned acts in the twentieth century. As the Nuremberg Tribunal stated after World War II, “[T]hat international law imposes duties and liabilities upon individuals as well as upon States has long been recognized . . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>56</sup>

Individuals have long played an important role in the enforcement of international law as well. For centuries, private citizens whose rights were violated by the citizens of another state could apply to their own sovereign for permission to seek a private remedy through the use of force—a self-help process carefully regulated by the rules of reprisal.<sup>57</sup> Reprisal was authorized only where the original offense was unlawful and other peaceful measures to obtain satisfaction had failed. Grover Clark noted that analogous state-sanctioned private remedies were common in English domestic practice in the centuries before the national government was capable of enforcing the law among residents of different towns.<sup>58</sup> On the international stage, national governments similarly authorized private reprisals where they could not otherwise offer remedies for their citizens.

Reprisals were the peacetime version of privateering, the officially authorized plunder of enemy ships during war. Rules regulating the conduct of war at sea constituted the most important area governed by international law until the early twentieth century. An extraordinarily complex body of law developed to determine which vessels—and what portions of their cargo—could be seized, as well as who had the right to litigate the validity of a seizure and in which domestic courts. In general, elaborate rules protected neutral vessels from at-

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54. *Id.* at \*68.

55. For a discussion of the gradual development of international rules barring slavery and the slave trade, see Roger S. Clark, *Steven Spielberg's Amistad and Other Things I Have Thought About in the Past Forty Years: International (Criminal) Law, Conflict of Laws, Insurance and Slavery*, 30 RUTGERS L.J. 371, 383-410 (1999).

56. *Judgment, in 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL* 411, 465-66 (1948).

57. See the extensive discussion of the rules regulating reprisals in Grover Clark, *The English Practice with Regard to Reprisals by Private Persons*, 27 AM. J. INT'L L. 694 (1933).

58. *Id.* at 704-05.



tack, while those affiliated with enemy states were subject to seizure—but multiple issues complicated this simple structure, including the status of neutral cargo on enemy ships and enemy cargo on neutral ships, the standing of enemy aliens, and the difficulty of determining the nationality of certain vessels.

The law of naval prize has an extraordinarily rich history, longer and deeper than perhaps any other discrete subject matter in the law of nations . . . . This area of law mattered to early modern States. Affected individuals took pains to know their rights and obligations in times of war. They kept records on the capture practices not only of their own nation, but also those of their neighbors and of the great maritime powers. It would not be extravagant to say that the development of the law of maritime prize was paradigmatic of the role of custom and state practice in the formative centuries of international law. For many of those years, the law of prize was the law of nations.<sup>59</sup>

This entire set of rules was largely enforced through individual actors who were empowered to seize and keep ships and cargo—but required to defend their actions in prize courts.

Thus, although traditionalists emphasize the state-to-state foundation of international legal relations, individuals have both asserted rights and been subject to international duties for centuries. As Korowicz concluded, “The idea that international law rules not only the intercourse of independent states but also that its provisions are directly binding on individuals without the intermediary of their state, is at least as old as the science of international law . . . .”<sup>60</sup>

During the nineteenth century, influenced by the rise of positivism, international law was gradually redefined to focus on state-to-state relations. Those who viewed international law as purely statist came to dominate the international law discourse. Private international interactions were relegated to a separate discipline and individual rights and duties under public international law downplayed. Positivists dismissed the moral, natural law basis of international obligations, only recognizing the validity of agreements accepted by states, the only actors recognized as subjects of international law. As stated by Oppenheim in 1955, “Since the Law of Nations is primarily a law between States, States are, to that extent, the only subjects of the Law of Nations.”<sup>61</sup>

Over the course of the twentieth century, however, individuals have regained their historical role in that system. Indeed, for nearly one

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59. David J. Bederman, *The Feigned Demise of Prize*, 9 EMORY INT'L L. REV. 31, 33 (1995).

60. Korowicz, *supra* note 47, at 534.

61. L. OPPENHEIM, 1 INTERNATIONAL LAW 636 (Lauterpacht ed., 8th ed. 1955).

hundred years, treaties have provided for individual petition mechanisms, allowing individuals to assert their rights directly in international tribunals.<sup>62</sup> Beginning early in the twentieth century, bilateral and multilateral treaties authorized individuals to file complaints alleging violations of treaty rights. The early international courts recognized private rights of action to enforce treaty provisions. Operating from 1908-1918, for example, the short-lived Central American Court of Justice was the first international tribunal to permit private parties to raise violations of treaties and other international norms.

The horrors of World War II triggered a revolutionary expansion of internationally protected individual rights. Most importantly, international law recognized that individuals have the right to protection from their own government. The world community has now acknowledged universally binding norms prohibiting egregious violations such as genocide, torture, and slavery, as well as war crimes and crimes against humanity. These developments have put to rest the argument that only the state can define or enforce its citizens' rights on the international stage.

Since World War II, several multilateral treaties have created individual petition mechanisms that authorize private individuals to file complaints against states alleging violations of international law. The International Covenant on Civil and Political Rights (ICCPR), for example, sets forth a series of government obligations to respect and protect "the equal and inalienable rights of all members of the human family."<sup>63</sup> The ICCPR bars discrimination and physical abuses, such as torture, while guaranteeing basic rights, including freedom of association and expression and political participation. An optional protocol to the ICCPR, ratified by over one hundred countries, authorizes the United Nations Human Rights Committee to receive complaints from individuals alleging violations of these rights. Similar individual petition systems have been established pursuant to the Convention Against Torture and the Convention on the Elimination of All Forms of Racial Discrimination as well as by regional human rights agreements for Europe, the Americas, and Africa.<sup>64</sup>

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62. For discussions of the earliest examples, see IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 554-55, 584-85 (4th ed. 1990); P.K. Menon, *The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine*, 1 J. TRANSNAT'L L. & POL'Y 151, 158-66 (1992).

63. International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 U.N.T.S. 172 [hereinafter ICCPR].

64. For an overview of these individual enforcement mechanisms, see Antonio Augusto Cançado Trindade, *The Consolidation of the Procedural Capacity of Individuals in the Evolution of*

Each of these treaties is also monitored through reporting requirements; member states are required to submit regular reports detailing their compliance with the treaty obligations. However, the individual petition system is central to the international approach to human rights. "The essence of the international protection of human rights is the opposition of individual complainants to respondent states in cases of alleged violations of the protected rights."<sup>65</sup>

There is still debate about the source of human rights, pitting the positivist view that such rights are granted by states through international treaties and custom against the view that human beings have inherent rights by virtue of their humanity. Regardless of the ultimate source, it is now clear that international law protects each individual's right to be free of gross human rights violations and affords various mechanisms by which individuals can assert their rights.

Moreover, despite the rhetoric of the positivist era, individuals were never completely displaced from a role in enforcing international law. National legal systems have consistently permitted enforcement of international rights. Much enforcement takes place through these domestic legal systems, which incorporate and implement international law mandates through mechanisms appropriate to the peculiarities of their legal structures. This domestic enforcement also affords a central role to individuals as actors seeking implementation of international law norms.

### III. INDIVIDUALS ENFORCING INTERNATIONAL LAW IN DOMESTIC COURTS: A COMPARATIVE VIEW

International law is now enforced by a far-flung network of global, regional and national institutions. But for centuries, domestic legal systems were the only means by which international law could be enforced. As noted by the Supreme Court over two hundred years ago, "[T]he law of nations, or of nature and reason, is . . . enforced by . . . the municipal law of the country; which latter may . . . facilitate or improve the execution of its decisions, by any means they shall think best, provided the great universal law remains unaltered."<sup>66</sup>

National enforcement has continued to play a central role in the development and implementation of international law, even as global and regional systems have multiplied. One reason for these overlapping jurisdictions is the weakness of international mechanisms. In the

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*the International Protection of Human Rights: Present State and Perspectives at the Turn of the Century*, 30 COLUM. HUM. RTS. L. REV. 1 (1998).

65. *Id.* at 7.

66. *Ross v. Rittenhouse*, 2 U.S. (2 Dall.) 160, 162 (1792).

absence of a global government equipped with effective enforcement mechanisms, international law by necessity must be implemented by national bodies. But domestic enforcement of international law is not just a response to the weakness of the international legal system. Even in a world governed by global institutions, national legal systems would play an important role in the incorporation of international standards into domestic law. The European system provides one example: the continent boasts a strong and effective regional system, but national judiciaries remain the first line of defense for international norms.

Analysis of U.S. human rights litigation often assumes that in permitting such claims the United States is out on a limb, unsupported by the practices of any other nation. In fact, the U.S. line of cases bears important similarities to legal approaches that are underway in several nations and developing just as rapidly as the U.S. precedents.

First, civil lawsuits have been filed in several common law legal systems challenging corporate abuses committed by domestic corporations in their operations abroad. One case filed in England, for example, charged that a British asbestos corporation had permitted its foreign subsidiary in South Africa to operate in a way that endangered the health of black workers and their families.<sup>67</sup> The plaintiffs alleged that the company forced black workers into the most dangerous jobs, without health care, while white workers were protected from the asbestos dust and received proper health care.<sup>68</sup> A similar case filed against a British chemical company, Thor Chemical Holdings, resulted in a series of settlements that compensated South African workers poisoned by mercury.<sup>69</sup> The plaintiffs alleged that faced with health and safety problems in England, the defendant moved its operations to South Africa, where it "recycled" workers—replacing contaminated workers when their mercury levels rose too high—rather than instituting the protections that would have been required in England.<sup>70</sup>

Although properly styled as violations of domestic law, these lawsuits share the goals of much human rights litigation: holding accountable those who violate the fundamental rights of individuals around

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67. See *Lubbe v. Cape PLC*, 4 All E.R. 268 (H.L. 2000) (reversing lower court order dismissing case based on *forum non conveniens*); *Tory Advisers Try to Sabotage Court Case*, THE INDEP., Feb. 4, 1999, at 1-2 (discussing underlying facts of plaintiffs' claims).

68. *Lubbe*, 4 All E. R. 268.

69. See Richard Meeran, *Accountability of Transnationals for Human Rights Abuses*, 148 NEW L.J. 1686 (Nov. 13, 1998), 148 NEW L.J. 1706 (Nov. 20, 1998) (detailing allegations of this and other suits against corporations).

70. See Meeran, *supra* note 69.

the world. Claims in the United States that might be styled as international law violations have been filed as negligence claims in England, Canada, and Australia.<sup>71</sup> This litigation strategy may be necessitated by the absence of domestic statutory authorization such as that provided by the Alien Tort Claims Act.<sup>72</sup>

Second, civil lawsuits in the United States have much in common with privately initiated criminal prosecutions in civil law legal systems. These similarities are often overlooked because of a tendency among domestic lawyers to assume that the lines dividing the categories of criminal and civil are fixed and definable and are constant across different legal systems. In fact, such lines are difficult to pin down even within a single legal system and do not transfer automatically from one system to another.

It is not surprising that these distinctions would vary across national lines. Even within legal systems, they are hard to define. In the United States, the civil/criminal divide has important constitutional consequences: defendants in criminal proceedings have the right to a panoply of constitutional protections that are not afforded to civil litigants. Despite repeated efforts, however, the U.S. Supreme Court has not been able to draw a clear line.<sup>73</sup> The European regional system has confronted similar difficulties in applying criminal law protections to procedures that originate in diverse domestic legal systems. Rather than rely upon the domestic label, the European Court of Human Rights conducts an independent inquiry to determine the proper classification of legal actions. In deciding whether a proceeding is properly classified as criminal rather than civil, the court considers whether the purpose of the proceedings is "deterrent and punitive" and whether the sanction imposed is "in its nature and degree" appropriate "to the 'criminal' sphere."<sup>74</sup>

Similar issues underlie scholarly efforts to draw a theoretical line between civil and criminal proceedings. Among the factors considered by commentators are whether sanctions are imposed for the pur-

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71. See Meeran, *supra* note 69; Halina Ward, *Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options*, 24 HASTINGS INT'L & COMP. L. REV. 451, 456-58 (2001) (listing cases).

72. See TORTURE AS TORT (Craig Scott ed., 2001) (containing a series of essays that review the possibilities of bringing claims directly as international law violations). See also Human Rights Committee, International Law Association (British Branch), *Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad*, reprinted in 2001 EUR. HUM. RTS. L. REV. 129 (discussing the possibility of civil human rights litigation in England).

73. Modern Supreme Court efforts to classify actions for constitutional purposes have been described as "an incoherent muddle." Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1268 (1998).

74. *Ozturk v. Germany*, 73 Eur. Ct. H.R. (ser. A) at 3, 52, 50 (1984).

pose of punishment and moral condemnation or for compensation and whether the proceedings are controlled by a private party or the government. But these factors vary widely over time and among legal systems. As David Friedman has concluded, "[O]utside of the accidents of a particular legal system at a particular time, there is no natural category of tort or crime and thus no essential distinction."<sup>75</sup>

Having spent many years explaining U.S. human rights litigation to baffled colleagues from many countries, I now understand all too clearly the importance of understanding these comparative differences. "Civil" and "criminal" mean different things in different legal systems. Consider here two of the overlapping and shifting lines often used to delineate the difference.

One commonly identified distinction between civil actions and criminal prosecutions is a difference in the purpose of a judgment: civil actions are said to be designed to compensate the injured party, without any attendant moral condemnation of the offender, while criminal actions aim to punish the guilty party for morally blameworthy conduct. United States tort actions, however, particularly those that include punitive damages, are designed to deter and punish as well as to compensate, and entail moral condemnation. As the Supreme Court said in the late nineteenth century, "The principle of permitting damages, in certain cases, to go beyond naked compensation, is for example, and the punishment of the guilty party for the wicked, corrupt, and malignant motive and design which prompted him to the wrongful act."<sup>76</sup>

On the other hand, criminal prosecutions in many countries include the possibility of monetary compensation to those injured by the criminal acts.<sup>77</sup> In some systems, compensation is an automatic feature of a criminal prosecution. In others, compensation is obtained by means of a coordinated civil suit, attached to the criminal prosecution and relying on the facts developed at the criminal trial. In such systems, if acts are subject to criminal prosecution, it may not be necessary for a private person to undertake an independent civil action for compensation.

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75. David Friedman, *Beyond the Tort/Crime Distinction*, 76 B.U. L. REV. 103, 108-09 (1996).

76. *Beckwith v. Bean*, 98 U.S. 266, 277 (1878).

77. See generally J.A. Jolowicz, *Procedural Questions*, in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 13, at 5-11 (Andre Tunc ed., 1986) (describing the interdependence of civil and criminal actions in many legal systems); Matti Joutsen, *Listening to the Victim: The Victim's Role in European Criminal Justice Systems*, 34 WAYNE L. REV. 95, 115-18 (1987) (describing *partie civile* system that is in effect in many European legal systems).

Another traditional distinction between criminal and civil actions focuses on the party in charge of the proceeding: public prosecutors handle criminal prosecutions while private parties litigate torts. A significant difference between civil human rights litigation and criminal prosecutions in the United States is the fact that private plaintiffs control civil lawsuits while government prosecutors generally conduct prosecutions. But comparative analysis also blurs the public/private distinction. In many civil law legal systems, private parties can file and even prosecute criminal proceedings.<sup>78</sup> Moreover, criminal prosecutions in many systems rely upon an inquiry conducted by an investigating magistrate; those magistrates may operate with a great deal of independence from the executive branch of their governments. The Spanish prosecution of Augusto Pinochet, which led to the attempt to extradite him from England, illustrates both of these strands of independence: the prosecution was initiated by private parties over the objection of the public prosecutors, and the investigation was conducted by a magistrate despite the opposition of the country's executive branch.<sup>79</sup>

Examples of such privately initiated, magistrate-driven prosecutions for human rights violations are common across Europe; in addition, one is underway in Paraguay, while another was filed but later dismissed in Senegal. As with the *Pinochet* case, the potential for embarrassment of the political branches of the government is high. A criminal case filed against Ariel Sharon in Belgium, for example, charges him with responsibility for the massacre of hundreds of Palestinians in refugee camps in Lebanon. Approximately thirty similar private criminal complaints have been filed in Belgium, under a broad criminal jurisdiction statute that permitted criminal prosecutions for universal crimes committed anywhere in the world, even where the defendant was not present in Belgium at the time the complaint was filed.<sup>80</sup>

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78. See Joutsen, *supra* note 77, at 110-14 (comparing private prosecution in several European systems); Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 613 n.400, 669-70 (1990) (describing the French system of privately initiated prosecutions).

79. See Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311, 311-12 (2001).

80. A Belgian court has recently reinterpreted the statute to require the physical presence of the defendant, a ruling that is currently under appeal. A proposal currently under discussion would limit the physical presence requirement to private prosecutions filed after July 1, 2002, the date on which the statute of the International Criminal Court came into force. For discussion of the Belgian court decision, see <http://web.amnesty.org/ai.nsf/Index/MDE151012002?OpenDocument&of=THEMES\INTERNATIONAL+JUSTICE> (last visited July 24, 2002). For discussion of proposal to amend Belgian law, see *The Belgian Law of Universal Jurisdiction: A Second*

Private criminal prosecutions may also be filed against corporations. A new, non-profit organization in France was formed for the sole purpose of pursuing criminal human rights prosecutions against corporations. Its first prosecution was filed in March 2002 against a French corporation, alleging illegal plundering of resources in Cameroon.<sup>81</sup> Criminal investigations have also been initiated in Belgium against an oil company for activities in Burma.<sup>82</sup>

Although rare today, private sanctions for criminal violations were common in the early years of the U.S. legal system. Criminal laws were enforced through a system of private claims as well as by public criminal prosecutions.<sup>83</sup> As the Supreme Court noted in 1805, "Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information."<sup>84</sup> This mixture of private and public enforcement continued into the twentieth century: "The right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer."<sup>85</sup> Such private enforcement actions addressed violations of the public trust as well as private crimes. Although less common today, several states continue to recognize private prosecutions in limited circumstances.<sup>86</sup>

Civil human rights litigation in the United States bears a strong resemblance to actions termed criminal in other nations. These examples indicate that private parties are engaged in the enforcement of international human rights norms in the domestic courts of many nations. In the United States, such efforts are limited to civil lawsuits.

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*Wind*, at <http://www.fidh.org> (last visited July 24, 2002). For list of defendants currently facing privately initiated criminal investigations in Belgian, see *Une trentaine de dirigeants visés par la loi belge de compétence universelle*, AGENCE FR. PRESSE, June 26, 2002 (Fr.).

81. See *7 Cameroonians Confront the French Rougier Group and its Cameroonian Affiliate SFID Before French Tribunal*, at <http://www.amisdelaterr.org/actu/2002/2002-03-26.html> (last visited July 24, 2002).

82. See *TotalFinaElf Faces Lawsuit by Myanmar Refugees Over Govt Human Rights Abuses*, at [http://www.ananova.com/business/story/sm\\_583620.html?menu+business.latestheadlines](http://www.ananova.com/business/story/sm_583620.html?menu+business.latestheadlines) (last visited July 24, 2002).

83. See Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations"*, 42 WM. & MARY L. REV. 447, 508-17 (2000) (discussing intertwined criminal and civil remedies in eighteenth and nineteenth century U.S. legal system).

84. *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341 (1805).

85. *Marvin v. Trout*, 199 U.S. 212, 225 (1905).

86. Alabama, Georgia, Indiana, Ohio, Pennsylvania, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin allow privately compensated attorneys to play various roles in criminal prosecutions. Matthew S. Nichols, *No One Can Serve Two Masters: Arguments Against Private Prosecutors*, 13 CAP. DEF. J. 279, 282 n.14 (2001).



In many countries, they are more likely to entail privately initiated criminal prosecutions, requests to magistrates to open investigations, or civil claims attached to criminal prosecutions.

These varied approaches reflect the diversity and strength of national legal systems as a means to enforce international law. All of these actions are part of the expanding international movement toward accountability for violations of international law. In each, the individual plays a key role as an enforcer of international norms. Each domestic legal system implements the international norms in a manner consistent with its local procedures.<sup>87</sup> The transnational approach "affirms the role of domestic institutions in enforcing international obligations and acknowledges the critical role of individuals in this process."<sup>88</sup> Despite our unique line of civil litigation, the United States has significant company in this growing trend towards private enforcement of international law in domestic courts.

#### IV. THE U.S. PERSPECTIVE: HUMAN RIGHTS LITIGATION AND FOREIGN POLICY

Primary control over U.S. foreign policy is assigned to the political branches of our government, the executive branch in collaboration with Congress. Despite this delegation and the deference it is generally accorded, individuals play important roles in prodding and pushing the government toward preferred foreign policy positions. One means by which this is accomplished is litigation. Indeed, in a law-abiding society such as ours, it would be surprising if lawsuits were not used in this way. Equally unsurprising, the judiciary has developed means by which to protect the political branches from interference in these delegated tasks. In this section, I look first at the history of foreign policy litigation, and then at the political question doctrine. I then briefly review the supposedly dangerous human rights cases, concluding that they pose no threat to U.S. foreign policy or to the political branches' management of that policy.

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87. I have elsewhere labeled this process the "translation" of international obligations into domestic law. Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis Of Domestic Remedies For International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002).

88. William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward A Universal System of Transnational Law Litigation*, 41 HARV. INT'L L.J. 129, 132 (2000).

### A. *The Historical Context: Individuals Impacting Foreign Policy*

Human rights cases may be filed with the direct intent to influence both the development of international law and the foreign policy of the United States and other countries. In some cases, this goal is sought through the imposition of damage awards. In others, collection of damages is unlikely, at best; plaintiffs may seek broad policy goals as well as personal satisfaction. Some may even see the litigation as leverage to achieve settlements with the defendants, as has been alleged about several of the Holocaust lawsuits.

Such mixed motives are hardly unique to human rights litigation. Many private litigants employ litigation as a tactic in a larger struggle, seeking to exert pressure towards a favorable settlement. Indeed, such strategic use of litigation has become a standard in business relations, where lawsuits are used as "a weapon in business competition."<sup>89</sup> The impact on the court system of "scorched earth" business litigation is many magnitudes higher than that of the several dozen human rights cases filed over the past two decades.

Moreover, in contrast to the purely private goals of business litigation, human rights lawsuits belong to a public interest tradition in which advocates have long used civil litigation as part of broad campaigns aimed at legal and political reform. In recognition of the similarities between human rights litigation and U.S. civil rights lawsuits, *Filártiga* has been called the *Brown v. Board of Education* of transnational law litigation,<sup>90</sup> a powerful reminder of the reform potential of civil litigation.

Litigation, of course, is not the only means by which individuals seek to influence foreign policy in ways that have at times pleased government officials but, just as often, have frustrated and infuriated them. Indeed, the Alien Tort Claims Act is thought to have been a reaction in part to the diplomatic uproar caused when a French citizen, Charles de Longchamps, insulted a French diplomat, Francis

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89. Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and its Values*, 59 BROOK. L. REV. 931, 943 (1993). Garth concludes:

The recognition that litigation is often merely a weapon in business competition has become almost commonplace . . . . Settlement out of court is the paradigmatic result of big litigation. Teams of lawyers, working feverishly, use the tools of discovery and motion practice to try to raise the settlement value of their side of the case. The result of the new era of business and professional competition in the 1970s and 1980s, in sum, was scorched earth litigation, undertaken largely for business reasons, which lead to settlements out of court.

*Id.* at 943-44.

90. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991).

Marbois, in Philadelphia. The furious Marbois later arranged a meeting on the street at which de Longchamps assaulted him—by striking his cane.<sup>91</sup> The commotion triggered by this minor incident nearly provoked war between France and the fledgling Confederation.<sup>92</sup> De Longchamps was apparently upset about Marbois's failure to authenticate official French government documents, a consular duty. He expressed his anger not through a lawsuit, but through direct action, seeking out Marbois, berating him, and finally resorting to violence to express his outrage. The result of this resort to self-help was an international crisis.

Alas, to the great consternation of politicians and diplomats, individuals often act in ways that complicate efforts to regulate international affairs. Examples abound from every period of U.S. history. During the Washington administration, Gideon Henfield insisted on fighting alongside the French against the British, in violation of U.S. neutrality.<sup>93</sup> Settlers provoked wars with Native Americans, seeking to force the government into wars of conquest. At the turn of the last century, William Randolph Hearst propelled the United States into war with Spain. Citizens of varied political persuasions opposed U.S. entry into World War I, while later generations opposed, and shortened, the war in Vietnam through a range of legal protest and nonviolent civil disobedience, as well as acts of violence that we would now label domestic terrorism. Fear of popular reaction to Vietnam-like entanglements forced our political leaders to limit the use of U.S. troops abroad for decades—but this, of course, is the essence of democracy.

United States citizens living abroad often force the U.S. government into foreign policy dilemmas. A U.S. teenager living in Singapore engaged in a foolish act of vandalism and was sentenced to be flogged with a cane. In the midst of a growing international and domestic uproar, President Bill Clinton asked the Singapore government to suspend the punishment and the United States threatened to block Singapore's bid to host an international trade meeting. Although the

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91. *Respublica v. de Longchamps*, 1 U.S. (1 Dall.) 111, 111-12 (Court of Oyer and Terminer, Phila. 1784).

92. Professor William Casto has cited dozens of references to the incident in the correspondence of the leading political figures of the time. William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 492-93 n.143 (1986). In the absence of a federal judiciary, the affair was left in the hands of slow-moving state officials. Although de Longchamps was eventually convicted in state court, French officials remained dissatisfied with the manner in which the state had handled the incident. Lack of federal authority in this and similar cases contributed to the Framers' decision to create a federal court system.

93. See *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360).

diplomatic dispute gradually abated, the event triggered a period in which the United States treated Singapore as *persona non grata*.<sup>94</sup> During the same time period, the much more serious travails of Lori Berenson forced the U.S. government to adjust its foreign policy toward Peru. Arrested and charged with participating in acts of terrorism in Peru, Berenson was originally tried before a Peruvian military tribunal. The U.S. opposition to her mistreatment may come back to haunt the current administration as it pushes for military tribunals in this country.<sup>95</sup>

By comparison, legal claims filed in U.S. courts would appear to constitute a much less controversial, less threatening avenue by which citizens can challenge U.S. policies. Nevertheless, litigation initiated by private citizens has created foreign policy headaches since the earliest days of the U.S. government. In 1782, a U.S. privateer captured the ship the *San Antonio* in the mouth of the Mississippi river, sailed it to Massachusetts, and filed a claim to seize it as British property.<sup>96</sup> The legal claim provoked a diplomatic battle involving both the French and Spanish governments.irate letters forwarded to Congress alleged that the seizure violated international law because the ship and its cargo belonged to Spanish citizens and had been seized in Spanish territory. Congress replied with a resolution noting that the dispute should be resolved in the courts. Although the Spanish claimants won a decision from the Massachusetts court, the defendants refused to comply with the judgment. During that transitional period before the ratification of the Constitution, Congress and the federal government as a whole had little power to assist the foreign litigants claiming a violation of international law in the *San Antonio* case, a shortcoming that contributed to the decision to establish federal

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94. See Alejandro Reyes, *Rough Justice: A Caning in Singapore Stirs Up a Fierce Debate About Crime and Punishment*, ASIA WEEK, May 25, 1994, available at <http://www.corpun.com/awfay9405.htm> (last visited Sept. 7, 2002) (reporting that President Clinton denounced the punishment as "excessive" and the U.S. trade representative announced that it would oppose Singapore's bid to host 1996 World Trade Organization meeting); Chua Lee Hoong, *Time for a Refresher Course on Singapore Foreign Policy*, STRAITS TIMES, Jan. 23, 2002, available at <http://straitstimes.asia1.com.sg/columnist/0,1886,16-98421,00.html> (last visited Sept. 7, 2002) (stating that "[b]etween 1993 and 1996, following the caning of schoolboy vandal Michael Fay, the Clinton administration in effect relegated Singapore to the status of *persona non grata*").

95. See, e.g., Human Rights Watch, *U.S.: New Military Commissions Threaten Rights, Credibility*, Letter to President Bush, Nov. 15, 2001, available at <http://www.hrw.org/press/2001/11/miltribsltr1115.htm> (last visited Sept. 7, 2002) (expressing concern about Executive Order on military tribunals, noting that the United States has "routinely condemned" violations of due process rights, including, for example, the trial of Lori Berenson).

96. The case is described at length in Henry J. Bourguignon, *Incorporation of the Law of Nations During the American Revolution — The Case of the San Antonio*, 71 AM. J. INT'L L. 270 (1977).

courts. But it is important to note that even at a time when foreign policy controversies threatened to thrust our weak nation into war with the European military powers, Congress saw the judicial process and the application of the law as the proper response to objections from abroad.

With the transfer of jurisdiction over such cases to the federal courts, the federal government obtained the power to enforce its own judgments. Controversies triggered by individual efforts to enforce international law in U.S. courts, however, have remained a constant irritant to the federal government. In the 1790s, the French Ambassador to the United States sought to file criminal charges for seditious libel against John Jay, the Chief Justice of the U.S. Supreme Court.<sup>97</sup> This political minefield involved the most explosive diplomatic controversy facing the U.S. government at the time: the war between France and Britain and the United States' determination to preserve a position of neutrality. The administration nevertheless maintained a measured position, informing the ambassador that the government would not file criminal charges, but he was free to do so through a private criminal prosecution.

In 1812, private citizens asked the federal courts to seize a warship belonging to the government of France and declare them to be its rightful owners. The libelants claimed that the ship had been illegally seized from them by agents of the French emperor, Napoleon. The U.S. Attorney submitted a "suggestion" to the court in which he relayed the French government's position that the ship was a "public vessel" of the government of France, lawfully within its possession and entitled to freely enter and leave the territory of the United States. At the request of the executive branch, the Supreme Court expedited its hearing of the case because it involved "political relations" between the United States and France. The Supreme Court decision in the case, *The Schooner Exchange v. McFaddon*,<sup>98</sup> is now a foundational piece of our law of territorial jurisdiction. The Court wrestled with and resolved the conflict between principles of absolute territorial sovereignty and the comity offered by one sovereign government to another, despite the diplomatic minefield surrounding the case.

Another of our most famous precedents, *Foster v. Neilson*,<sup>99</sup> is remembered for its holding that a "non-self-executing" treaty cannot be enforced through a private lawsuit in the absence of congressional

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97. See William Casto, *America's First Independent Counsel: The Planned Criminal Prosecution of Chief Justice John Jay*, 1 GREEN BAG 2D 353 (1998) (discussing the incident).

98. 11 U.S. (7 Cranch) 116 (1812).

99. 27 U.S. (2 Pet.) 253 (1829).

implementing legislation.<sup>100</sup> But the underlying facts of the case involved a struggle over international law and foreign policy. Foster sought to defend his title to land obtained through a Spanish land-grant, as promised in a series of treaties ratified by the United States, Spain, and France. His legal arguments were futile in the face of a wave of settlers seeking to open the newly obtained Louisiana purchase to slave-based agriculture. Foster asserted international law rights over the opposition of the U.S. government. Again, the issues he raised were duly resolved by the courts, despite their political sensitivity.<sup>101</sup>

Legal battles over the slave trade also forced the United States into unwanted confrontations with European powers. Roger Clark has detailed the astonishing legal contortions triggered by the treatment of human beings as merchandise—as well as the repeated efforts to obtain a definitive statement from U.S. courts that the slave trade violated international law.<sup>102</sup> Justice Story, sitting as a circuit judge, made such a statement in *La Jeune Eugenie*,<sup>103</sup> thrusting the U.S. judiciary into an activist role in the battle to outlaw the slave trade.<sup>104</sup>

The international legal status of the slave trade reached the Supreme Court in *The Antelope*,<sup>105</sup> which addressed the fate of several groups of Africans seized as slaves, captured by a U.S. privateer and eventually brought to the United States.<sup>106</sup> The ensuing legal battles pitted the U.S. captain against Spanish and Portuguese citizens, supported by their governments, who alleged ownership of some of the Africans. The U.S. government entered the case to argue that their transport by U.S. citizens into U.S. territory violated U.S. law and they therefore should be set free. An evenly divided Supreme Court was unable to resolve the central issue, the validity of the slave trade under international law, and therefore let stand the lower court decision that the domestic law of each country would govern. As a result, some of the Africans were set free while others were returned to foreign claimants. The Court again ducked the issue of the international law status of the slave trade in *The Amistad*,<sup>107</sup> newly made famous by

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100. *Id.*

101. See Henry J. Richardson III, *Excluding Race Strategies from International Legal History: The Self-Executing Treaty Doctrine and the Southern Africa Tripartite Agreement*, 45 VILL. L. REV. 1091 (2000).

102. Clark, *supra* note 55.

103. 26 F. Cas. 832 (C.C.D. Mass. 1822).

104. *Id.*

105. 23 U.S. (10 Wheat.) 66 (1825).

106. *Id.*; Clark, *supra* note 55, at 401-10.

107. 40 U.S. (15 Pet.) 518 (1841); see Clark, *supra* note 55.

Steven Spielberg.<sup>108</sup> That case forced the Supreme Court to resolve a dispute involving the governments of Spain and Cuba as well as conflicting views from the U.S. government; the Court resolved the claims by finding that Spanish law applied and rendered the seizure of the Africans illegal.

In each of these disputes, the individual actions of U.S. citizens and foreigners forced the judiciary to consider one of the most controversial issues of our foreign and domestic policy. Individual use of the courts to "meddle" in foreign policy is hardly a product of the late twentieth century. To the contrary, such actions bear a long pedigree.

Litigation continues to be employed intentionally as a tactic in battles over U.S. foreign policy, in challenges, for example, to the Vietnam War and the Gulf War, the U.S. presence in El Salvador and Nicaragua, and the intervention in Kosovo. Lawsuits have challenged U.S. nuclear policy and, currently, the treatment of the detainees held at the Guantanamo Naval Base. Litigation in each of these examples has been one tactic among many employed by opponents of U.S. foreign policy and by those injured as a result of that policy. But litigation invokes the peaceful process of the courts, rather than self-help. Surely, a law-abiding society prefers to encourage lawsuits challenging foreign policy rather than civil disobedience or other extra-legal means.

Legal efforts to implement international law and challenge foreign policy differ from lobbying, political protest, and civil disobedience in that they seek to invoke the power of the federal government through an official judicial resolution of the claim. Professor Bradley points to this as a key distinction between private protest and litigation: "Private parties are free in this country, of course, to criticize foreign governments on their own. Both the symbolic benefits and the foreign relations costs of international human rights litigation, however, largely stem from the official nature of the proceedings."<sup>109</sup> But this official stamp of approval is only obtained in those cases where the plaintiffs are successful. Where the courts dismiss a case, there is no such stamp of approval. Clearly meritless claims are generally disposed of through preliminary motions and the courts can impose the appropriate sanctions where proceedings are frivolous or otherwise violate court rules. But where claims meet the minimal requirements of our legal system, the effort required to consider and then reject

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108. See Clark, *supra* note 55.

109. Bradley, *supra* note 3, at 460 n.12.

meritless claims is a necessary by-product of a properly functioning judicial system.

Plaintiffs may seek press coverage of the fact that a court case has been filed, and the mere filing of a case, even a case that has no merit, may exert some pressure on the defendants. This is true in all litigation; as noted, the use of court filings to obtain a strategic advantage is commonplace in commercial litigation. But the line between the official actions of our government and the allegations of a private lawsuit are clear to our allies and opponents as well. There is no evidence that the U.S. government has been held responsible by other governments for unsuccessful lawsuits filed in U.S. courts.

Indeed, the cases that do provoke diplomatic uproars are those that have the backing of the political branches of the government. For example, the Supreme Court decision upholding the kidnaping of a suspect from Mexico for trial in the United States triggered a huge international controversy, not because the judiciary heard and decided the case, but because the U.S. executive branch urged the Court to uphold the legality of the kidnaping.<sup>110</sup> Similarly, as discussed in a later section, human rights litigation under the terrorist state exception to the Foreign Sovereign Immunities Act is properly seen as a product of U.S. foreign policy because the statute was recently enacted by Congress and signed into law by the President.

Moreover, where the executive branch presents a cogent argument that pending litigation poses a threat to foreign policy, it generally finds a receptive judiciary. As discussed in the following section, the executive branch and the judiciary are well able to short-circuit such litigation.

### *B. Human Rights Litigation and Political Questions*

The complaint that human rights litigation trespasses upon the foreign affairs powers of the executive branch rests upon two grounds. First, individuals should not be permitted to meddle in issues as to which they have no competence. Second, the judiciary is constitutionally barred from interference in foreign affairs, a result of the constitutional assignment of such issues to the executive branch. I argue throughout that individual forays into areas that impact foreign affairs are neither new nor unusual—nor limited to litigation. Indeed, human rights lawsuits are among the less threatening mechanisms by

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110. Mark S. Zaid, *Military Might Versus Sovereign Right: The Kidnaping of Dr. Humberto Alvarez-Machain and the Resulting Fallout*, 19 Hous. J. INT'L L. 829 (1997) (detailing foreign government reaction to the *Alvarez-Machain* case).



which individuals seek to impact world affairs, far less disruptive than civil disobedience, much less violent than protest.

The impact of litigation in the United States is limited in part by application of well-recognized judicial doctrines of restraint.<sup>111</sup> Most important for my purposes, certain cases raising issues of foreign affairs fall within the narrow—and controversial—reach of the political question doctrine. The doctrine purports to identify certain questions as inappropriate for judicial review because they constitutionally assigned to the other two branches of government. Although issues implicating foreign affairs are within the core of the doctrine's definition, such cases are not necessarily nonjusticiable. To the contrary, the Court in *Baker v. Carr*<sup>112</sup> stated clearly that "it is error to suppose that every case or controversy which touches upon foreign relations lies beyond judicial cognizance."<sup>113</sup>

Human rights litigation spans a broad spectrum, with domestic as well as foreign plaintiffs and defendants and events occurring within the United States as well as abroad. But all such cases have some connection to foreign affairs, if only because the claims are based upon international law and thus of concern to other nations as well as our own. However, as taught by *Baker*, this foreign connection is not enough to trigger the separation-of-powers concerns underlying the political question doctrine. Indeed, most international human rights cases do not trigger the political question doctrine.

The standard formulation of the political question doctrine, set forth in *Baker*, examines whether the issue has been assigned by the Constitution to one of the other branches, whether there are judicially manageable standards to resolve it, and whether it involves policy decisions unfit for judicial review, on which the federal government must speak with one voice.<sup>114</sup> Standards developed by the lower courts offer some guidance in applying these factors. One key distinction is between cases that challenge U.S. foreign policy and those that challenge only the implementation of policy in a particular case. The District of Columbia Circuit thus would dismiss as nonjusticiable claims

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111. As Professor Harold Koh has written, "Rather than applying overbroad rules that treat all transnational public law cases as inherently unfit for domestic adjudication, courts should target their concerns by applying those doctrines that have been specifically tailored to address them." Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2382-94 (1991).

112. 369 U.S. 186 (1962).

113. *Id.* at 211.

114. *Id.* at 217.

involving “sweeping challenges to the Executive’s foreign policy,”<sup>115</sup> while agreeing to resolve “a challenge to one possible method of policy implementation.”<sup>116</sup> Along similar lines, the Second Circuit in *Kadic v. Karadzic*<sup>117</sup> noted that the constitutionally assigned task of the judiciary is to resolve individual complaints of violations of legally protected rights. Where the claim is based in tort, the court said, the branch of the government “to whom this issues has been ‘constitutionally committed’ is none other than our own—the Judiciary.”<sup>118</sup> Thus, human rights litigation fits within the constitutionally assigned task of the courts: to resolve complaints of unlawful harms filed by individual plaintiffs against those responsible for their injuries.

In addition, the Supreme Court has indicated that where liability is created by a federal statute, the courts have an obligation to hear the dispute.<sup>119</sup> That is, where the legislature—acting within its constitutional powers—has instructed the judicial branch to adjudicate a category of claims, the political question doctrine and its separation-of-powers concerns simply have no relevance. This analysis clearly applies to cases litigated pursuant to the Torture Victim Protection Act (TVPA), the Anti-Terrorism Act, and the “state sponsors of terrorism” exception to the Foreign Sovereign Immunities Act (FSIA). Each is a congressional statute authorizing private plaintiffs to sue in federal court for violations of human rights. Each defines both the violations creating liability and the defendants subject to suit. Tellingly, it is suits under the FSIA exception that most threaten to trigger foreign policy crises. But challenges to these lawsuits on the basis of the political question doctrine must fail, because the political branches have authorized the lawsuits.

As to the Alien Tort Claims Act, there is an active and heated debate in academic literature about whether the political branches have, in fact, authorized its use as a basis for human rights litigation. The statute itself was enacted over two hundred years ago; the current usage is based on cases decided over the past two decades. But it is a mistake to paint the decisions as products of the judicial branch alone. The executive branch filed a Statement of Interest in support of the

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115. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1512 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985).

116. *Lamont v. Woods*, 948 F.2d 825, 833 (2d Cir. 1991).

117. 70 F.3d 232 (2d Cir. 1995).

118. *Id.* at 249 (quoting *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991)).

119. *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986) (stating that “under the Constitution, one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones”).

plaintiffs in the very first case, *Filártiga v. Peña-Irala*. That statement specifically rejected resort to the political question doctrine. While acknowledging that such cases are likely to implicate foreign policy considerations, the brief concludes that "the protection of fundamental human rights is not committed exclusively to the political branches of government."<sup>120</sup>

The courts are properly confined to determining whether an individual has suffered a denial of rights guaranteed him as an individual by customary international law. Accordingly, before entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection. When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights.<sup>121</sup>

Under President Ronald Reagan, the executive branch later wavered in its support for the *Filártiga* precedent. In a brief filed in a case against the Philippine dictator Ferdinand Marcos, the Reagan Justice Department argued that the ATCA should be strictly limited to human rights abuses that are incorporated in some way into U.S. law through a separate federal statute imposing criminal sanctions or creating a civil right of action.<sup>122</sup> Later filings, however, have again been supportive, as in a Statement of Interest filed in *Kadic* that once again rejected application of the political question doctrine. In response to the court's invitation to submit its views in that case, the Solicitor General and the Legal Advisor to the State Department supported application of the *Filártiga* doctrine, urging the court to assert jurisdiction over the case. The government's Statement of Interest concluded, "Although there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, this is not one of them."<sup>123</sup>

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120. Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), reprinted in 12 HASTINGS INT'L & COMP. L. REV. 34, 45 (1988).

121. *Id.* at 46 (footnote omitted).

122. See discussion of U.S. amicus brief in *Trajano v. Marcos*, 978 F.2d 493, 500 (9th Cir. 1992) (explaining refusal to be bound by "executive branch's flip on this issue," because the executive branch views contradicted the plain language of the statute).

123. *Kadic*, 70 F.3d at 250.

More recent executive branch statements have also accepted the validity of the *Filártiga* line of cases, while considering the application of cautionary doctrines on a case-by-case basis. Thus, in a case against the Unocal Corporation, the State Department opined that resolution of the case would not have a negative impact upon U.S. foreign policy.<sup>124</sup> In a case against the Rio Tinto Corporation arising out of mining operations in Papua New Guinea, however, the State Department noted ongoing peace negotiations in that country and stated that adjudication of the lawsuit “would risk a potentially serious adverse impact . . . on the conduct of [U.S.] foreign relations.”<sup>125</sup> In response, the district court dismissed the case.<sup>126</sup> The courts have also dismissed ATCA claims arising out of World War II as nonjusticiable political questions.<sup>127</sup> These lawsuits asked the courts to revisit claims that, according to the executive branch, had been resolved by the agreements that ended the war. Where the executive branch raises valid concerns about foreign affairs and the political question, the courts have given a respectful hearing to the administration’s views and generally have been willing to follow its guidance.

During the same time period, Congress has indicated its support for the ATCA cases in several ways. The legislative reports accompanying the TVPA, for example, affirm the importance of the ATCA, stating that the statute “has other important uses and should not be replaced.”<sup>128</sup> Moreover, the TVPA is but one of three recent statutes enacted in this area that *expand* upon the ATCA without in anyway indicating that it should be repealed or narrowed.

124. Letter of Michael J. Matheson, Acting Legal Advisor (July 8, 1997), *reprinted in* Nat’l Coalition Gov. of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 362 (C.D. Cal. 1997) [hereinafter Matheson Letter] (stating that “adjudication of the claims based on the allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma”).

125. *Sarei v. Rio Tinto*, Civ. No. CV 00-11695, 2002 WL 1906814, at \*49 (C.D. Cal. July 9, 2002) (amended order granting defendants’ motion to dismiss).

126. *Id.*

127. *See, e.g., Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 483-89 (D.N.J. 1999) (dismissing slave labor claims against German corporations as raising nonjusticiable political questions). This claim was later settled and the pending appeal withdrawn. A large group of claims against Japanese defendants have been dismissed, some on the basis of the peace treaties signed by Japan and others on the statute of limitations. *See* Michael J. Bazylar, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT’L L. 11, 26-29 (2002). A California statute attempting to extend the statute of limitations on such claims was declared unconstitutional as an interference with the federal government’s foreign policy powers. *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160 (N.D. Cal. 2001). Two California state courts, however, have upheld the state statute. Bazylar, *supra*, at 31 n.94. All of these California cases are currently on appeal.

128. H.R. REP. NO. 367-102, at 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86.

The current interpretation and application of the ATCA is thus a product of the collective actions of the executive branch and Congress, as well as the courts. With the exception of the *Trajano* brief filed in the infancy of this line of cases, the executive branch has repeatedly either expressed support for the doctrine or challenged its application on narrow grounds in particular cases. And Congress has addressed the general concept of civil remedies for international human rights abuses three times over the past ten years, each time broadening the categories of plaintiffs, defendants, or abuses subject to its reach. The judiciary, therefore, can reasonably conclude that the adjudication of civil lawsuits on the *Filártiga* model represents the policy of all branches of the federal government.

### C. *A Question of Jurisdiction*

Modern human rights litigation has been criticized as permitting individuals to draw the U.S. government into controversies that are none of its business, forcing the exercise of jurisdiction over events or people that have no connection to the United States. Most of the historical examples discussed above involved U.S. actors, events that took place in the United States, or property physically present in the this country. But most of the modern cases also involve U.S. actors: the majority are filed against individual or corporate defendants based in the United States. Even cases filed against individual foreigners usually involve defendants who are living in the United States, as in *Filártiga*, where the defendant had relocated to this country precisely to avoid accountability at home.

A small number of cases address abuses committed abroad by foreign defendants in foreign countries. Jurisdiction in these cases is based upon either the physical presence of transitory defendants or the minimum contacts of corporations doing business in the United States. These are the standard rules of jurisdiction applied by U.S. courts to issues ranging from antitrust to torts and contracts, but are not followed by the domestic legal systems of most other countries.

Although U.S. courts invoke jurisdiction based on these domestic rules, the assertion of jurisdiction over human rights abuses committed abroad is also justified by the international rule of universal jurisdiction. International law permits—and in some situations obligates—domestic legal systems to assert jurisdiction over a small class of wrongs considered of universal concern. Universal jurisdiction “recognize[s] that international law permits any state to apply its laws to punish certain offenses although the state has no links of territory with the offense, or of nationality with the offender (or even the

victim)."<sup>129</sup> Jurisdiction is based instead on the international community's collective interest in sanctioning egregious violations of international law. Growing out of the universal prohibition of piracy and the slave trade, the concept is applied today to violations such as genocide, war crimes, crimes against humanity, and torture.<sup>130</sup>

In situations in which the international community has accepted universal jurisdiction, the diplomatic repercussions caused by individual lawsuits in the United States are mitigated. Such cases have strong support from international law and fit within an expanding international movement. Cases based on universal jurisdiction have been filed in several European countries, as well as in Africa and South America. Indeed, this common international foundation may account in part for the fact that there have actually been very few diplomatic complaints about the U.S. litigation, with the exception of cases filed directly against foreign governments under the exception to the Foreign Sovereign Immunities Act. I turn now to examine the evidence that modern human rights litigation in the United States does not, in fact, threaten the delicate balance of our democracy.

#### *D. More a Whimper Than a Bang*

My focus up to this point has been to show that individual legal actions that seek to enforce international law and thereby to influence foreign policy are well-grounded in international law, the domestic law of other countries, and our own history and practice. Let me briefly note here that fears about the foreign policy impact of U.S. human rights litigation are largely overblown.

First, concerns are often based on surveys of all of the cases that have been filed, regardless of outcome. Looking at this broad sample, critics are able to express fears about lawsuits in U.S. courts challeng-

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129. THE RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. a (1987) [hereinafter RESTATEMENT]. The territoriality principle does not apply to offenses "generally regarded as offenses of an international character of serious concern to the international community as a whole, which it is accepted may be punished by whichever state has custody of the offender." 1 OPPENHEIM'S INTERNATIONAL LAW 469 (Robert Jennings & Arthur Watts eds., 9th ed. 1992). See Roger S. Clark, *Offenses of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg*, 57 NORDIC J. INT'L L. 49 (1988) (providing a comprehensive analysis of treaty provisions authorizing universal jurisdiction).

130. INTERNATIONAL LAW ASSOCIATION, FINAL REPORT ON THE EXERCISE OF UNIVERSAL JURISDICTION IN RESPECT OF GROSS HUMAN RIGHTS OFFENCES 4-9 (2000); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 788 (1988). The Restatement defines universal jurisdiction as applying to "certain offenses recognized by the community of nations as of universal concern," and offers as examples a non-exclusive list including "piracy, slave trade, attacks on or hijacking of aircraft, genocide and war crimes." RESTATEMENT, *supra* note 129, at § 404.

ing the domestic policies of countries around the world. But a majority of the most criticized cases have been dismissed by the district courts. It may be true that the media attention afforded to the filing of a lawsuit may cause some foreign policy discomfort, but there is absolutely nothing that can or should be done to stop such a legitimate use of our courts. Where cases are frivolous, they can be sanctioned through standard procedures. But rather than blocking access to the courts for lawsuits that meet the basic requirements of the federal rules, the federal government should permit the legal process to deal with such cases on their merits.

Second, as noted, the cases that arouse the most concern are those against foreign governments, authorized by Congress, with the signature of the President. There is simply no basis for arguing that plaintiffs who file cases authorized by the political branches, or judges who resolve them, are interfering with the foreign policy prerogatives of those two branches. Where the executive branch and Congress have decided that individual actions are authorized, concerns about separation of powers are simply misplaced.

Finally, a word about another category of cases that has aroused protest: human rights cases filed against corporations. Here again, there are several sub-categories. Cases filed against corporations for abuses committed during World War II have triggered significant outrage. But these cases are truly *sui generis*, both in terms of the issues they raise and the successful settlement of several of them. Some were dismissed at the urging of the executive branch. Many settled, but only in part because of the leverage exerted by the litigation—political pressure outside of the courtroom and economic pressure through threats to boycott the defendant corporations and banks played an important role.

A more pertinent set of cases are those filed against corporations for recent or ongoing human rights abuses, such as those against Royal Dutch Petroleum, Unocal, Texaco, and Chevron. Most of these do not actually raise foreign policy concerns—either the governments involved did not object or our government dismissed their objections. The executive branch, for example, showed little concern about the complaints of the government of Burma, a military regime that has been severely criticized and ostracized by our government.<sup>131</sup> Where

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131. See Matheson Letter, *supra* note 124 (stating that “adjudication of the claims based on the allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma”).

the state department did raise concerns about the impact on U.S. foreign policy in a recent case, the district court dismissed the claims.<sup>132</sup>

Indeed, the foreign protests raised by these cases pale in comparison to the howls heard in cases such as *Hartford Fire*,<sup>133</sup> where our allies filed protests over the U.S. assertion of jurisdiction over foreign insurance companies. One of the more exasperating aspects of the critique of "plaintiff's diplomacy" is the sense that human rights cases are being subjected to more exacting scrutiny than garden variety tort and contract claims. Domestic and foreign corporations are routinely sued in U.S. court for acts that occurred abroad. Why should they not also be subject to suit for human rights violations committed in the same location?

## V. CONCLUSION

Complaints about individual enforcement of human rights and the danger such efforts pose to foreign policy raise both legal and policy concerns. Legally, I argue, such claims fall comfortably within the structures of international law, the domestic law of nations around the world, and our own legal traditions. As a matter of policy, the risks posed by such lawsuits are minimal. On the other hand, efforts to close the courtroom door to such claims would indeed threaten democratic values.

Furthermore, government efforts to restrain individual enforcement mechanisms highlight complaints about the very nature of state sovereignty. Most human rights prohibitions are defined as restraints on government powers.<sup>134</sup> Individual enforcement of human rights norms generally pits the individual against a state, challenging both violations of international law and the failure to provide domestic remedies. Governments are obligated both to refrain from committing human rights abuses and to afford those injured by such abuses remedies by which they can seek redress.<sup>135</sup> Thus, human rights en-

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132. *Sarei*, 2002 WL 1906814, at \*1.

133. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

134. The Torture Convention, for example, defines certain acts as torture when "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 1, § 1, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force for the United States Nov. 20, 1994).

135. The Universal Declaration of Human Rights states explicitly: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating . . . fundamental rights . . ." Universal Declaration of Human Rights, art. 8, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp. No. 49, U.N. Doc. A/810 (1948). See also ICCPR, *supra* note 63, at art. 2(3) (specify-



forcement generally involves an individual victimized by state repression who seeks redress against a government, its officials, or those who act in concert with them.<sup>136</sup>

Although the nation-state has proven to be a tremendous force of stability in the modern world, it also carries with it the danger of unchecked repressive power over those subject to its control. For many, the sovereign state remains an "iron cage" from which they are "obliged to communicate with the outside world, in a legal sense, through very close-set bars."<sup>137</sup> Even with the inroads that followed World War II and the human rights movement of the past decades, many individuals continue to be confined within the "cage" of their own government. Individual enforcement of human rights norms constitutes an attempt to break through the walls erected by states to protect their monopoly of power.

Restrictions on individual efforts to enforce international law only highlight the inconsistencies of a world in which many humans have no access to remedies for violations of their most fundamental rights. States have developed detailed rules that govern their own behavior toward individuals, but have resisted efforts to create comprehensive enforcement schemes. The existence of rights without remedies exposes a basic tension in the foundations of international law. Individuals are pushing hard to force states to concede that they must strengthen enforcement mechanisms and hold accountable those who violate basic rights.

The protection of human rights, as much or even more than other areas of government policy, cries out for the vigilant involvement of individual citizens. Government policies must be subjected to probing challenges that expose hypocrisy and pierce efforts to cover-up complicity. Human rights are too important to be left in the unsupervised hands of governments. "Plaintiff's diplomacy" is one response to this challenge.

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ing that this "effective remedy" requires states "to develop the possibilities of judicial remedy," and "to ensure that the competent authorities shall enforce such remedies when granted").

136. Important exceptions to the state action requirement include genocide and slavery, both prohibited by international law whether committed by state officials or private actors. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 4, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force for the United States Feb. 23, 1989) (authorizing punishment of private individuals as well as public officials); Slavery Convention, Sept. 25, 1926, 60 L.N.T.S. 253 (prohibiting slavery under all circumstances). But those same treaties obligate states to prevent violations and punish private individuals who violate these norms.

137. NICOLAS POLITIS, *THE NEW ASPECTS OF INTERNATIONAL LAW* 30, 31 (1928).